

REPORT - PLANNING COMMISSION MEETING
August 26, 2004

Project Name and Number: BACCARAT RAILROAD LLC (PLN2000-00059)

Applicant: West Coast Venture Capital, LLC (formerly known as "Baccarat Railroad LLC"), Carl Berg and Myron Crawford

Proposal: To consider an application for a Preliminary Grading Plan.

Recommended Action: Deny the application.

Location: 41075 Railroad Avenue in the Irvington Planning Area.

APN: 525-195-87-3; 1525-195-1; 525-165-1-3; 525-150-1-3

Area: 14.9 acres

Owner: West Coast Venture Capital, LLC (formerly known as "Baccarat Railroad LLC")

Agent of Applicant: B. Clyde Beck, Architect

Environmental Review: This project is statutory exempt from CEQA review per CEQA Guidelines section 15270, Projects Which Are Disapproved.

Existing General Plan: Light Industrial

Existing Zoning: I-L Light Industrial

Existing Land Use: Construction businesses

Public Hearing Notice: Public hearing notification is applicable. 231 notices were mailed to owners and occupants of property within a minimum radius of 300 feet from the site on the following streets: Clymer Lane, Driscoll Road, Neal Terrace, Union Street, Main Street, Washington Boulevard, Ingersoll Terrace, Valero Drive, High Street, and Timber Creek Terrace. The notices to owners and occupants were mailed on August 13, 2003. A Public Hearing Notice was delivered to The Argus newspaper on August 9, 2003 to be published by August 12, 2003.

Executive Summary: The Project which is the subject of this application has been previously scheduled for Planning Commission action (on applicant's appeal of staff's determination that the application was incomplete) and continued 8 times between October 9, 2003, and July 8, 2004 (at the request or concurrence of the applicant). The atypical number of continuances for the appeal is a reflection of the efforts by City staff and the applicant to bring resolution to complex procedural disputes related to the incompleteness of the application. These efforts resulted in the applicant's withdrawal of its appeal (by letter dated June 25, 2004, attached), and the applicant's request for the application to be heard on its merits. While this report summarizes the bases for City staff's recommendation for Planning Commission to deny the current application on its merits, it should be noted that City staff continues to work with the applicant to discuss ways by which site development could be modified for further consideration by the City. A modified site development proposal would require a new application.

On September 16, 1999, the applicant submitted the application proposing a Preliminary Grading Plan and Initial Study for the development of industrial buildings on several adjoining parcels in the Irvington Planning Area. By letter dated October 13, 1999, City staff determined that the application was not complete for purposes of completing the environmental impact assessment or for considering approval of a development project. After several years of procedural disputes between the applicant and City staff (summarized in attached letters from City staff dated August 11, 2003), the

applicant submitted an appeal requesting a determination from Planning Commission that: "the Application is complete, and that City staff must begin processing the Application in good faith" (by letters dated June 16, 2003, and September 3, 2003).

The appeal was initially scheduled to be heard by Planning Commission on October 9, 2003. However, based upon ongoing conversations between representatives of the applicant and City staff, the hearing was continued through July 8, 2004, in an effort to resolve the applicant's concerns at the staff level. On June 25, 2004, the applicant withdrew the appeal and requested that Planning Commission consider the application on its merits. City staff recommends that Planning Commission deny the application for the reasons summarized in this report, primarily including: the grading plans were not prepared by a civil engineer, the applicant did not obtain permission from the Bay Area Rapid Transit District ("BART") to grade on property owned by BART, and the applicant has failed to identify adequate fire safety access for the proposed development.

Background: The project site is generally located northerly of the intersection of Main Street and Railroad Avenue between the two railroad tracks. The railroad tracks on the western boundary of the site are owned and actively operated by Union Pacific Railroad Company ("UPRR"). The railroad tracks on the eastern boundary of the site were abandoned from active service approximately one year ago, through a sale of a former UPRR railroad corridor to the Santa Clara Valley Transportation Authority ("VTA"), in anticipation of a subsequent transfer of the corridor from VTA to BART for the proposed future extension of BART to the Warm Springs area ("BART WSX Project"). The northern boundary of the site is a City parcel which is traversed by Paseo Padre Parkway. West and east of the site, beyond the railroad tracks, is a mix of low and medium density housing. There are also a few other industrial properties near the Main Street and Railroad Avenue intersection. Current access to the property is at this intersection. The site is developed with buildings currently used by small construction businesses. The remainder of the site is vacant.

Project Description: The applicant proposes a Preliminary Grading Plan and Initial Study for the development of four industrial buildings on several adjoining parcels. The four buildings total 238,754 square feet. The applicant estimates 34,000 cubic yards of fill is needed for site grading. Planning Commission review of the Preliminary Grading Plan application is required because the estimated grading quantities exceed 1,000 cubic yards.

Application Process History: The application was originally submitted to the City on September 16, 1999. In a letter to the applicant dated October 13, 1999, City staff determined that "the application is not complete for purposes of completing the environmental impact assessment, or for considering approval of a development project," and the letter identified a list of issues to be resolved in order for the City to find the application complete. After a series of communications and correspondence between the applicant and City staff related to disputes as to the incompleteness of the application, City staff restated (in a letter dated May 8, 2000) its determination that the application was incomplete, and identified alternative steps to be taken by the applicant in order to further the processing of the application.

After two years passed with no additional information from the applicant in response to City staff's determination of incompleteness, the applicant began arguing (in a series of correspondence beginning April 3, 2002) that the application was already complete. City staff maintained the previously stated position that the application was incomplete. In response, the applicant filed a writ of mandate on February 3, 2003, requesting the Superior Court to order the City to process the application as complete. On June 19, 2003, the court determined that the applicant failed to exhaust administrative remedies through Planning Commission and City Council. Therefore, by letter dated June 16, 2003, the applicant requested a determination from Planning Commission that: "the Application is complete, and that City staff must begin processing the Application in good faith." Although City staff attempted to comply with the requests set forth in the applicant's appeal (through the attached letters from City staff dated August 11, 2003) by agreeing to process the application in good faith, the applicant reiterated its request for an appeal to the Planning Commission (by letter dated September 3, 2003), and the appeal was scheduled for Planning Commission action on October 9, 2003.

Between October 9, 2003 and July 8, 2004, City staff worked with the applicant in an effort to resolve outstanding procedural disputes regarding the processing of the application; and, during this time, Planning Commission's action on the appeal was continued. By the attached letter dated June 25, 2004, the applicant withdrew the appeal and requested that Planning Commission consider the application on its merits. For the reasons summarized in this report, City staff recommends that Planning Commission deny the application on its merits.

However, before proceeding to the merits of the application, it is also important to provide procedural context regarding statements made in the applicant's June 25 letter regarding the alleged impact of the City's eminent domain action on the processing of the application. City staff acknowledges that, on September 19, 2003, the City made a formal offer to purchase a portion of the applicant's property (an approximately 60 foot strip on the east side of the site; 2.2 acres of the 14.9 acre total site area) for the purpose of constructing the City's planned roadway/rail grade separation project at Washington Boulevard and Paseo Padre Parkway ("Grade Separation Project"). On January 27, 2004, the City Council adopted a Resolution of Necessity authorizing the filing of an eminent domain court action to acquire this property; and, the court's Order for Prejudgment Possession essentially granted the City possession and control of the property as of approximately June 14, 2004. While the June 25 letter alleges that the City "obligated" the applicant to obtain a final decision on the merits of the application (based on the applicant's apparent misunderstanding of arguments made by the City in court documents), City staff has actually consistently argued that the applicant failed to exhaust administrative remedies related to this application prior to the City's actions to acquire the property for the Grade Separation Project through eminent domain. In any case, since the applicant now requests a decision on the merits of the application, City staff recommends denial on the bases outlined in this report.

Project Analysis:

The proposed project is required to comply with the requirements of the City's Grading Ordinance (Fremont Municipal Code title VIII, chapter 4), as well as the City of Fremont General Plan and Zoning Ordinance (Fremont Municipal Code title VIII, chapter 2).

Application Process Requirements: Pursuant to Fremont Municipal Code Section 8-4104, the grading plans are required to be prepared by a registered civil engineer. The submitted drawings, Plan Sheets A1 – A4 entitled "Railroad Avenue Industrial Park, Fremont California," date last plotted September 10, 1999, identify an architect (B. Clyde Beck) but no civil engineer is identified on the drawings. The consultant list also identifies architect Clyde Beck, but does not list civil engineers or other consultants. Thus, the submitted drawings are not in compliance with Fremont Municipal Code Section 8-4104.

The proposed Preliminary Grading Plan includes grading on an adjacent property that is not owned by the applicant. The adjacent parcel is owned by Bay Area Rapid Transit (BART). Fremont Municipal Code Section 8-4103 requires the applicant to obtain signed written permission from owners of all property on which the grading work is proposed to be performed. Thus, the applicant was required to obtain written consent from BART related to the grading on BART's property. BART did enter into a "Right of Way Contract" dated August 27, 1985, with the previous owner of the subject property, for a previous application (Tentative Tract Map 5384). However, that tentative tract map has expired, and a final map was never recorded. Although the applicant's attorney has argued that BART has previously provided written consent (pursuant to the expired tentative tract map), BART has disputed the Applicant's interpretation of the Right of Way Contract in correspondence dated December 15, 1999, and February 1, 2000 (enclosed). The applicant has not resolved this dispute with BART. Additionally, as stated above, the court's Order for Prejudgment Possession on approximately June 14, 2004, granted possession and control over a portion of the subject property to the City. The applicant has neither requested nor obtained permission from the City to grade the portion of the property under City control. For these reasons, the applicant is not in compliance with the requirements of FMC section 8-4103.

General Plan and Zoning Conformance: The General Plan land use designation for the project site is Light Industrial. The proposed industrial development is in conformance with the industrial land use designation. The land use allows warehousing, storage, and a variety of industrial uses oriented toward serving local businesses and residents. The project area is discussed in the Draft Irvington Concept Plan as having the potential to convert to residential uses when the UPRR railroad tracks on the west side of the project site are relocated to the east side of the project site, which is a planned component of the City's Grade Separation Project.

The four buildings total 238,754 square feet and are permitted uses in the I-L Light Industrial District. The proposed application has a Floor Area Ratio (FAR) of 0.367 and proposes 686 parking spaces. It is not clear from the project description if the proposed structures are warehouses or for more intense industrial users. If the proposal is for warehouse use, the allowed FAR is .45 and the project is in conformance. The parking requirement is also considerably

less than the proposed number of spaces. If the proposal is for industrial (assembly/manufacturing) buildings, the allowed FAR is .35 and the parking requirement is 796 spaces. The proposed plan is deficient 110 parking spaces. In order to construct an industrial development at this square footage, the applicant would have to apply for a finding for FAR increase. Additionally, a redesign to provide more parking spaces, or a finding to reduce the required parking, would also be required. The above FAR calculations are based on the subject parcels original size prior to the court granting possession and control over a portion of the subject property to the City. The same floor area ratios (.35 and .45) would apply to the reduced site size.

Circulation/Access Analysis: Two points of access are required for the development of the industrial project as shown on the application. The basis for this requirement is fundamental protection of public safety. The Health and Safety Chapter of the General Plan addresses safety in regards to new industrial development through the following policies:

Policy HS 4.1.2: Require adequate access and clearance for fire equipment, fire suppression personnel, and evacuation.

Policy HS 6.2.1: Require that hazardous materials be managed in a manner that minimizes the risk to workers and residents.

Implementation measures of the above policies include review of proposed development projects for fire access, additional clearance, and fire resistant construction as required by the Fire Department and in accordance with California Fire Code section 902. The project site is long, narrow, and between two railroad tracks. As proposed in the application, the one point of access is at the southern edge of the project site, perpendicular to the Hayward fault at the opening of the project site. An earthquake, vehicle accident, or hazardous materials release which severed the one point of access to the proposed project could result in catastrophic damages, with extremely limited ability for emergency workers to access the site or employees onsite to evacuate.

The applicant has previously argued that the City should allow the applicant to develop the industrial project as proposed with one point of access (as shown on the submitted plans). The applicant has argued that there is support for this position based on the City's previous approval of a tentative map on the subject property in 1985 (which expired without being developed in 1989). However, the previous approval by the City nearly 20 years ago does not establish a precedent for setting conditions of approval for a subsequent development application. The applicant has argued that the City's previous approval of the 1985 tentative map is evidence that one point of access is consistent with the general plan and zoning requirements. City staff disputes this conclusion due to the many different circumstances between the City's review of the 1985 tentative map, and this application. The City of Fremont General Plan was revised and updated in 1991. A new Health and Safety chapter adopted policies in regards to new industrial development. In addition to distinctions between the two proposed projects, over the past 20 years, there have been advances regarding earthquake impacts and safety measures to protect against these dangers.

If the applicant believes that it can identify alternative fire safety protections which would be sufficient to safely permit development of the proposed project with one point of access, as an alternative to the two points of vehicular access identified by City staff, then the applicant would have the burden of submitting supporting documentation for this alternative approach. Alternatively, the applicant could reduce the scope of the proposed project. In the absence of such additional supporting documentation, or reductions to the scope of the proposed project, the project does not provide two points of access sufficient to serve the public safety requirements of the proposed project.

Additional Required Studies: The project is recommended for denial based on lack of sufficient information to determine mitigation measures related to traffic, seismic impacts, and biotics.

- A traffic study is required to assess the traffic impacts of the proposed industrial project.
- The Hayward Fault traverses this site near the only access point. Seismic analysis is required to determine building construction type and setbacks from the geologic hazard zone. The applicant has submitted "Soil and Geology Investigation, Proposed Commercial/Industrial Development, 41075 Railroad Avenue," prepared by Judd Hull and Associates, dated August 25, 1981. The applicant has also submitted "Geologic and Seismic Hazards Evaluation Action Fire Control Site," prepared by Earth Systems Consultants, dated January 1984.

While the submitted reports are specific to the project site, there have been advances in the sciences and technologies relating to geologic investigations, fault hazard identification, and design and construction codes. The two reports were written prior to Loma Prieta earthquake (1989) and the Northridge earthquake (1994). A new or supplemental report, prepared in accordance with the Alquist-Priolo Earthquake Fault Zoning Act, is required prior to City approval of a subdivision or structure for human occupancy.

- The applicant has submitted "Biotic and Wetland Survey of the Proposed Railroad Avenue Industrial Park" prepared by Wetlands Research Associates, Inc., and transmitted to the City via letter from applicant's attorney dated September 6, 2000. The City is also in receipt of an Addendum to the "Biotic and Wetland Survey of the Proposed Railroad Avenue Industrial Park" prepared by Wetlands Research Associates, Inc. and dated August 12, 2002. A peer review is required of biotic surveys as the City did not contract directly with the preparer of the report.

Grading/Topography: The project site is an approximately 15-acre property bounded by City property adjacent to Paseo Padre Parkway, High Street, and two railroad lines. The property is approximately 2,500 feet long in the north-south direction with an average width of approximately 250 feet. The site contains two main buildings and several minor buildings and sheds. All buildings are proposed to be demolished according to the grading plan.

Existing ground elevations on the project site vary from 55 feet at the northern boundary to 85 feet near the southern boundary. While the existing site generally slopes down to the north, the project proposes to adjust the grades such that a high point elevation of 78 feet is created between Building 1A and Building 2. The elevations decrease as one moves north or south from the proposed 78 foot contour.

The proposed grading is in anticipation of the construction of four industrial buildings, each having a constant finished floor elevation. The building finished floors vary from 11 feet above existing grade (Building 3) to 8 feet below existing grade (Building 1B). The project also proposes grading, consisting of cutting a slope, on the adjacent BART property. The slopes on the BART property are steep, approaching 2 horizontal to 1 vertical (2:1). In order to accomplish the grading proposed, the Project Architect has provided a balanced grading estimate of 34,000 cubic yards of cut and 34,000 cubic yards of fill, for total grading of 68,000 cubic yards (cut + fill). No import or export material is estimated.

Grading Ordinance Compliance: The project requires Planning Commission review and approval prior to issuance of a grading permit because the proposed grading exceeds 1,000 cubic yards (FMC 8-4108(a)(1)). When a grading permit is required, grading plans must be submitted to the City. Section 8-4104 of the Grading Ordinance lists the required documents to be submitted with the grading permit application.

The grading plans, drawings, and specifications are to be prepared by a registered civil engineer. A licensed architect, not a civil engineer, has prepared the plans submitted for this application. No civil engineer has been listed as a consultant on the application forms. Before approval of a grading permit, plans prepared by a registered civil engineer must be submitted for City review and approval.

Geologic Hazards: The southern portion of the project site (approximately seventy percent of the total site) is located within an Earthquake Fault Zone, as shown on maps published by the State Geologist. According to these maps, there is a potentially active fault that runs across the southern boundary of the site. The Site Plan and Site Grading Plan show a proposed 100-foot wide building restriction zone centered on the assumed location of the fault. Prior to issuance of building permits or approval of a subdivision, a geologic report, which identifies surface fault rupture hazards and includes geotechnical design recommendations, must be reviewed and approved by the City.

Development Impact Fees: The proposed development project would be subject to Citywide Development Impact Fees. For the proposed industrial project, these fees may include fees for fire facilities, capital facilities, and traffic. These fees are calculated at the fee rates in effect at the time of building permit issuance.

Environmental Analysis: This project is statutory exempt from CEQA review per CEQA Guidelines section 15270, Projects Which Are Disapproved.

Summary: Staff is processing this application at the request of the applicant. Staff has reviewed the application on the basis of the information submitted, but further studies and revisions are required before staff could recommend approval of this project. The Preliminary Grading Plan, as proposed, does not conform to City requirements as follows:

- The submitted drawings are not in compliance with Fremont Municipal Code Section 8-4104 because the drawings are not prepared by a registered civil engineer.
- The applicant is not in compliance with the requirements of FMC section 8-4103 because the applicant has not obtained consent from BART to grade on BART's property, and the applicant has not obtained consent from the City to grade on the property under the City's control pursuant to the court's Order for Prejudgment Possession.
- Based on the proposal for industrial (assembly/manufacturing) buildings, the allowed FAR is .35 and the parking requirement is 796 spaces. The proposed plan is deficient 110 parking spaces. In order to construct an industrial development at this square footage, the applicant would have to apply for a finding for FAR increase and to reduce the required parking. A revision to the site plan would require revisions to the grading plan.
- If the applicant can identify alternative fire safety protections which would be sufficient to safely permit development of the proposed project with one point of access, as an alternative to the two points of vehicular access identified by City staff, then the applicant must submit supporting documentation for this alternative approach. The applicant has not submitted such documentation.
- Issues regarding traffic, biological resources, and geologic and seismic hazards must be resolved prior to approval of an application.

Enclosures: Exhibit "A" (Preliminary Grading Plan)

Informational: Applicant justification statement

Applicant letter, 06/25/04

City Council report 01/27/04, Item 2.15

12/15/99 letter from BART to City regarding access to BART Parcel J-1005.

02/01/00 letter from BART to applicant's attorney regarding access to BART Parcel J-1005, with attached conformed copy of "Right of Way Contract" between BART and Paul Lamoreaux dated 8/27/85.

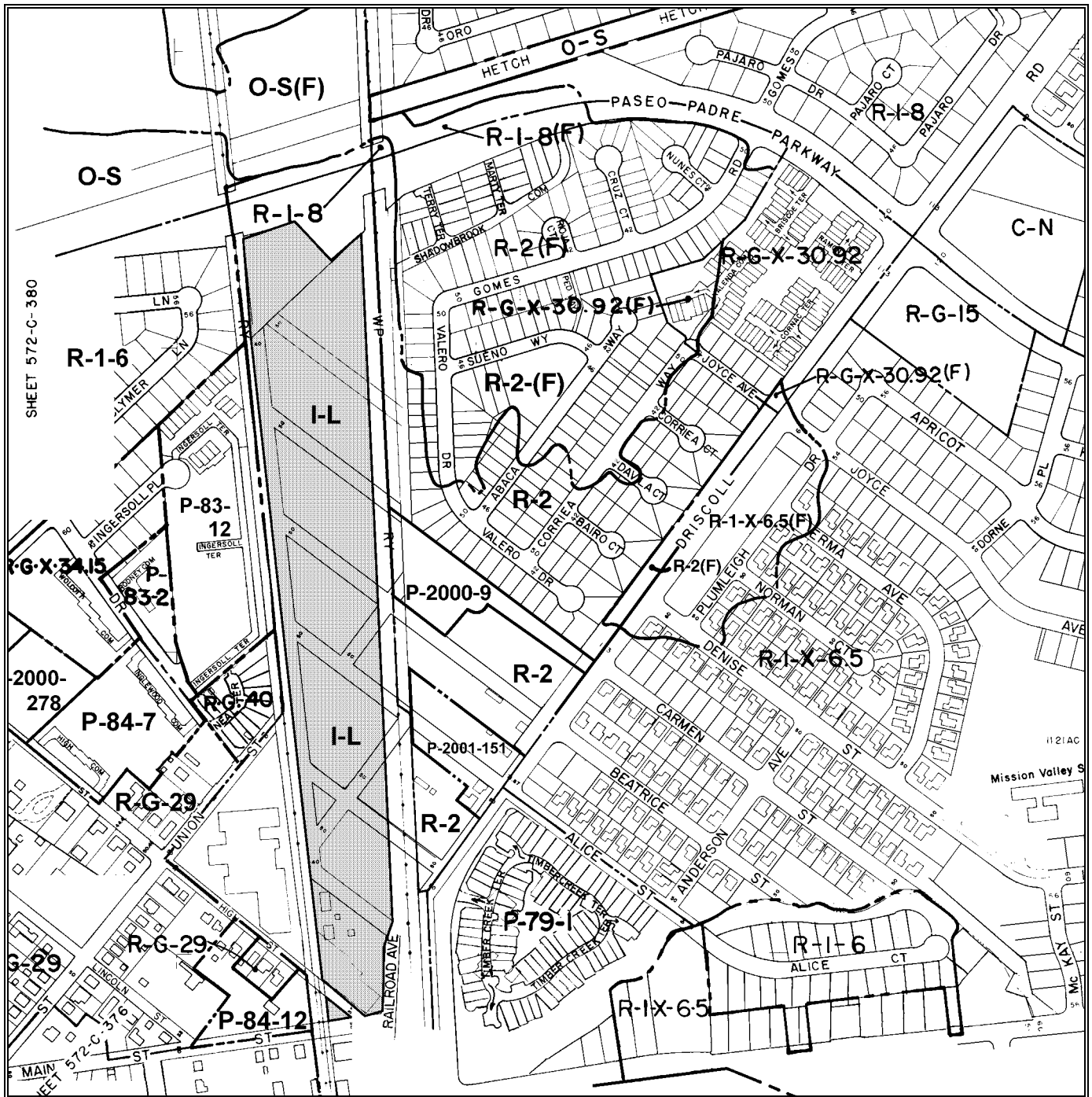
Background Documents Regarding Appeal of Incompleteness Determination

Exhibits: Exhibit "A" (Preliminary Grading Plan)

Recommended Actions:

1. Hold public hearing.
2. Deny the application on its merits (based on the information and exhibits identified in this report and presented during the public hearing).

Existing Zoning
Shaded Area represents the Project Site



Existing General Plan

